

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN DAVID HEWITT,

Defendant-Appellant.

UNPUBLISHED

September 15, 2011

No. 299241

Wayne Circuit Court

LC No. 10-002907-FC

Before: SAWYER, P.J., and JANSEN and DONOFRIO, J.J.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, assault with intent to do great bodily harm, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Because the trial court did not abuse its discretion in denying defendant's motion for substitution of counsel, and, because defendant has failed to establish that he was denied the effective assistance of counsel, we affirm.

The victim, James Lemon, testified that defendant called him on February 14, 2010, about coming over to visit. Defendant later arrived at Lemon's house, accompanied by a man he introduced as Terry. Lemon testified that Terry pulled a gun on him and defendant demanded Lemon's money. When Lemon tried to escape through a window, defendant told Terry to shoot Lemon and shots were fired. Lemon was shot as he went through the window.

Defendant denied being at Lemon's house. According to defendant, Lemon had a drug habit and defendant had previously introduced Lemon to a dealer named Steve, whom Lemon knew as Terry. According to defendant, on the day of the offense, Lemon called defendant at home looking for drugs and defendant told him to call one of the people defendant had introduced him to. Defendant stated that Lemon later called him back to report that he had spoken to Terry, who was on his way to Lemon's house. Defendant testified that later in the month after the offense, a man named Craig called and "asked about the whereabouts of the guy Terry and [said] that if I didn't give Mr. Lemon the full name and address of Terry, then he would hold me responsible, seeing I'm the one who introduced them."

Defendant first argues that the trial court erred in denying his motion for substitute counsel. We review a trial court's decision affecting a defendant's right to counsel of choice for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). A trial

court's decision regarding substitution of appointed counsel is also reviewed for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). An abuse of discretion occurs if the trial court's decision is outside the range of principled outcomes. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

While the record is unclear about the status of defense counsel as retained or appointed, at oral argument, appellate counsel advised that defendant's trial counsel was indeed retained. A motion to adjourn trial must be based on good cause. MCL 768.2; MCR 2.503(B)(1). When the trial court denies a motion to adjourn to retain another attorney, this Court considers the following factors:

(1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*Echavarria*, 233 Mich App at 369.]

Obviously, a constitutional right was involved; the Sixth Amendment guarantees the right to counsel in all criminal prosecutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). Defendant was certainly negligent in asserting his right because he waited until the day of trial to raise concerns about counsel's failure to file motions, subpoena documents, and take other actions to prepare for trial. Whether defendant was attempting to delay the trial cannot be determined from the record, but the trial court did not make such a finding, as was the case in *Echavarria*, 233 Mich App at 370.

As for the element of good cause, defendant asserts that he had a bona fide dispute with counsel and relies on two of the concerns voiced at trial: counsel's failure to subpoena telephone records and counsel's failure to pursue an alibi defense. Defendant stated that he wanted defense counsel to obtain telephone records. According to defendant, Lemon "made it quite clear that I called him. The phone records will show that's a lie." However, defendant testified at trial that he had called Lemon. Defendant stated, "He called me. I called him back. And then he called me again." Because Lemon testified that defendant called him but was never asked whether there was a series of calls between himself and defendant and defendant admitted that he called Lemon, the telephone records had no impeachment value. Therefore, while defendant may have had a dispute with defense counsel regarding whether the records should be subpoenaed, it was not a bona fide dispute because the records were irrelevant.

Defendant also took issue with defense counsel's failure to speak to potential alibi witnesses and file an alibi defense. An irreconcilable difference of opinion with counsel on whether to call certain alibi witnesses constitutes a bona fide dispute. *People v Charles O Williams*, 386 Mich 565, 576; 194 NW2d 337 (1972). Defendant identified one alibi witness as his fiancée, Sheila Jackson. He did not indicate what testimony Jackson could offer. Defense counsel stated that he had spoken to Jackson and, based on what she said, "it was my impression that she would not be an alibi witness." There is nothing in the record to show what information Jackson could have offered. Further, while defendant's testimony was not completely clear, he appeared to state that Jackson left the house sometime after 10:00 a.m. to go to church and he

was home alone between 12:00 and 12:30 p.m., the time Lemon called defendant to report that Steve/Terry was on his way over. Without any evidence to show exactly what time the robbery occurred and whether Jackson could place defendant at home (or elsewhere) at that time, Jackson could not provide defendant with an alibi. Therefore, while defendant may have had a dispute with defense counsel regarding whether to call Jackson as an alibi witness, it was not a bona fide dispute because there is nothing to show that Jackson could support defendant's testimony that he was not at Lemon's house that afternoon.

Defendant identified another alibi witness as a woman named Kelly who lived in Grosse Pointe. He complained that defense counsel had not contacted Kelly, but at the same time defendant admitted that he did not know Kelly's last name and did not have her telephone number. Defendant did not indicate what testimony Kelly could offer. Defense counsel advised the court that defendant had given him "other names," but "my position has been that those persons . . . needed to contact me so that I can interview them to determine whether or not they would be alibi witnesses." Without Kelly's full name, address, or telephone number, defense counsel had no way to contact Kelly to determine if she could provide defendant with an alibi. Therefore, while defendant may have had a dispute with defense counsel regarding whether to call Kelly as an alibi witness, it was not a bona fide dispute because defendant did not show that Kelly could offer him an alibi and failed to provide defense counsel with any information with which to even locate Kelly.

Defendant identified another alibi witness as a man named Craig and complained that defense counsel had not contacted Craig. Defendant did not identify Craig further or indicate what testimony he could offer. As was the case with Kelly, defense counsel advised the court that defendant had given him "other names," but "my position has been that those persons . . . needed to contact me so that I can interview them to determine whether or not they would be alibi witnesses." If this proposed witness was the same Craig who defendant referenced in his testimony, he plainly was not an alibi witness because defendant did not claim that Craig could place him somewhere other than Lemon's house on February 14. Rather, Craig contacted defendant several days after the offense to report that Lemon planned to falsely accuse defendant unless defendant provided information on how to locate Steve/Terry. Even if Craig had testified to corroborate defendant's testimony as to what Craig told him, his testimony would suffer from the same lack of logic as defendant's testimony: why would Lemon threaten to implicate defendant unless he provided information about Steve/Terry when Lemon had already implicated defendant by giving his name to the police at the scene? Therefore, while defendant may have had a dispute with defense counsel whether to call Craig as an alibi witness, it was not a bona fide dispute because defendant did not show that Craig could offer him an alibi and the record indicates that he did not provide defense counsel with any information with which to even locate Craig.

For all these reasons, defendant has not shown that a bona fide dispute existed with defense counsel regarding a fundamental trial tactic. Defendant did not show that telephone records had any impeachment value or that he had any witnesses who could support an alibi defense. Further, defendant waited until the day of trial to request substitution of counsel. "[T]he substitution of counsel on the day of trial would have significantly disrupted the judicial process by requiring an adjournment in order to permit the substituted counsel to become familiar with the case." *People v Kenneth Johnson*, 144 Mich App 125, 135; 373 NW2d 263

(1985). Defendant has failed to establish good cause for appointment of substitute counsel and thus the trial court did not abuse its discretion in denying defendant's motion.

Defendant next argues that the trial court erred in allowing the prosecutor to impeach him with prior convictions and that defense counsel was ineffective for failing to object. There is no merit to this argument because it was defense counsel who elicited testimony from defendant about his prior convictions on direct examination. Once the defense raised the issue, the prosecutor properly could pursue the subject on cross-examination. *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993). Therefore, any objection to the prosecutor's questions would have been futile and "[d]efense counsel is not required to make . . . a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant alternatively asserts that defense counsel was ineffective for failing to file a motion in limine to have the trial court determine whether the prior convictions were admissible for impeachment purposes under MRE 609. Defendant contends that had counsel filed such a motion, the trial court likely would have ruled that the evidence was inadmissible. However, defendant does not address the merits of his contention that the evidence did not qualify for admission under MRE 609 and, therefore, has abandoned this claim. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Defendant finally argues that defense counsel was ineffective for failing to request a limiting instruction regarding the proper use of his prior convictions. See CJI2d 3.4. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review is limited to errors apparent from the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish a claim of ineffective assistance of counsel, the defendant must "show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy." *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted).

An instruction consistent with CJI2d 3.4 would have been improper because it instructs that defendant's prior convictions cannot be considered for any purpose other than assessing defendant's credibility, yet evidence of at least one prior conviction was admitted by stipulation as substantive evidence to establish an element of the charge of felon in possession of a firearm. Further, given Lemon's unwavering testimony that defendant, a person he knew and who had visited his house in the past, committed the offenses with Terry, and defendant's nonsensical testimony that even though Lemon identified him as one of the two robbers at the scene, he subsequently threatened to falsely implicate defendant unless he disclosed Terry's whereabouts, there is no reasonable probability that the outcome of the trial would have been different had

counsel requested a limiting instruction. Therefore, defendant failed to show that he was prejudiced by counsel's alleged error.

Affirmed.

/s/ David H. Sawyer

/s/ Kathleen Jansen

/s/ Pat M. Donofrio